In the Supreme Court

of the United States

October Term, 1958

No. 43

WILLIAM R. FORMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD,
Of Counsel,
Public Service Building,
Portland, Oregon.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-59

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WILLIAM R. FORMAN,
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PETITIONER'S REPLY BRIEF

I.

The Government's Brief does not correctly present the questions involved (P. 2). The Court of Appeals did not determine that the case was submitted on an

"impermissible subsidiary conspiracy theory."

The Opinion of October 27, 1958 (App. 65), modifying the original Opinion, did not hold that the original Opinion was erroneous insofar as it determined that there was no evidence of the existence of a subsidiary conspiracy and that judgment

of acquittal should have been entered on that ground. The Court merely held

> "that the case **might have been tried** upon this alternative theory, namely, that the conspiracy continued past the filing of the returns for the purpose of protecting the taxpayers from tax prosecution." (Pet. App. p. 66) (Emphasis added)

The true question is, whether the Court of Appeals, after having determined that there was no evidence of the existence of a subsidiary conspiracy, as defined in the **Grunewald and Krulewitch cases,** and that judgment of acquittal should be entered on that ground, could, thereafter, send the case back for re-trial and submission to the Jury upon an "alternative theory" when the Government did not, in the District Court, object or except to the instructions as given or request submission of the case upon the purported "alternative theory." Does the modification deprive defendant of the constitutional protection against double jeopardy for the same offense under these circumstances?

In the District Court, the Government acquiesced in that submission. It did not object or except to the instructions as given and did not request any instruction embodying the so-called "alternative theory."

In the Court of Appeals, the Government did not in its brief or oral argument challenge the accuracy of the instructions so far as they were

given. It was not until the Government filed its petition for modification that it asserted that the case might have been submitted on the purported "alternative theory."

The legal effect of the Government's contention is that it can seek a conviction on one legal theory and seek affirmance of that conviction upon that theory, but when the Appellate Court reverses for lack of evidence sufficient for submission to the Jury, it can then seek another trial of the defendant upon another or "alternative theory." We submit that this constitutes a violation of the defendant's constitutional protection against double jeopardy.

In the original Opinion of September 15, 1958, which reversed the conviction with directions for the entry of a judgment of acquittal, the Court of Appeals held that

> "it was error to permit this case to go to the jury" (App. 63)

because there was no evidence in the record of the kind contemplated by the **Krulewitch and Grunewald cases** which require evidence of the existence of

> "an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission." (App. 63).

This was the kind of agreement that had to be established to prolong the operation of the statute

of limitations. The Court of Appeals held that there was no evidence of such an agreement.

The Court of Appeals did not depart from this conclusion in its Opinion of October 27, 1958 (App. 65),.or in the Opinion on Re-Hearing of February 26, 1959 (App. 68). It did not reverse itself in this respect. It merely held that under the indictment and evidence, the case "might" have been submitted on an "alternative theory" embracing the Government's contention that no subsidiary conspiracy was needed and that the conspiracy was a continuing one from the beginning. The Court did not hold that there was any error in the instructions so far as they were given. The Government now wants to go back and have the case re-tried and re-submitted on its "alternative theory."

II.

The ruling that there was lack of evidence sufficient for submission to the Jury on the issue of the operation of the statute of limitations was not upon an error "infecting" the trial (which would warrant direction of a new trial). It was a determination that the District Court should have, in the first instance, entered judgment of acquittal on Defendant's motion. That determination required the Court of Appeals, as a matter of law, to direct the District Court to enter a judgment of acquittal as it did in its first Opinion.

This is a criminal case in which the law denies to the Government the right to move for a new trial for any reason after judgment of acquittal and denies the Government the right of appeal from a judgment of acquittal. The policy of the law which deprived the Government of these rights, likewise precludes the direction of a new trial by the Appellate Court so that the Defendant could be tried on another or "alternative" legal theory even though the Government acquiesced in the theory on which the case was submitted and did not seek submission of the case on such other or "alternative theory" in the District Court.

The Government sought affirmance of the conviction on the instructions as given with respect to the operation of the statute of limitations. It cannot, after reversal and direction of a judgment of acquittal, become an appellant, assign error (failure to submit an alternative theory) and seek a new trial on an "alternative theory."

Whatever may be the rule in **civil cases** as to the power of the Court on reversal to remand for a new trial, the constitutional guaranty of protection against double jeopardy precludes the granting of a new trial upon reversal of a conviction in cases where the defendant was entitled as a matter of law, to a judgment of acquittal in the District Court by reason of the insufficiency of the evidence for submission to the Jury upon an issue essential to the conviction. It is only where the reversal is on

the ground of error "infecting" the trial that a new trial may be ordered.

Sapir v. U. S., 348 U.S. 373;
Karn v. U. S., 158 F.2d 568 (9th Cir.).

The Government attempts to avoid the application of the **Sapir and Karn cases** by urging that

> "The petitioner's principal contention . . . is based upon a misconception that the conviction was reversed for insufficiency of evidence rather than considerations relating to the statute of limitations."

There is no misconception of the Court's original Opinion. The Court reversed on the ground that the prosecution was barred by the statute of limitations. It did so because there was no evidence of

> "an express original agreement among the conspirators to continue to act in concert in order to cover up for their own protection traces of the crime after its commission."

Under the instructions of the Court, there could be no conviction unless such an agreement was established and the Court determined that there was no evidence of such an agreement sufficient for submission to the Jury. The existence of such an agreement was essential to conviction and the Court's determination that there was no evidence of such an agreement, is a determination based upon "insufficiency of evidence" which entitles a defendant to a judgment of acquittal as a matter of law.

If the Government had requested the District Court to submit to the jury an instruction embody-

ing the purported "alternative theory" and the request was denied, the Government could not have moved for a new trial on that ground in the District Court after acquittal and it could not, as **Appellee,** assign the refusal as error upon Defendant's appeal from the conviction and seek a new trial by reason thereof. The Government in legal effect, became an appellant in a criminal case when the law denies to the Government the right to move for a new trial or to become an appellant in a criminal case.

Section 2106 of Title 28 U.S.C.A., insofar as it authorizes the Appellate Court to

> "remand a cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances,"

must be construed in connection with and limited by the Fifth Amendment which provides that

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

It can never be "just" to deprive a citizen of the protection guaranteed by the Fifth Amendment. When the defendant has been tried and there has "accrued" to the defendant the right, as a matter of law, to a judgment of acquittal and the Court of Appeals has determined that he was erroneously denied that right, a defendant is placed in double jeopardy if the Court of Appeals remands for a new trial instead of directing the entry of a judgment of acquittal as should have been done by the District Court.

III.

The Government's Brief does not fully present the question involving the jurisdiction of the Court in its statement of "Questions Presented," (P. 2).

The Petitioner challenged the jurisdiction of the Court on two grounds:

(a) that jurisdiction cannot be predicated on allegation of overt acts barred by the statute of limitations; and

(b) jurisdiction cannot be predicated upon the allegation of overt acts which are not relevant to the specific object of the conspiracy.

As pointed out in the Petition for the Writ of Certiorari, the Government has now definitely disavowed the contention that the attempted evasion was to be accomplished **by the filing of false returns** and now insists that the attempted evasion was to be accomplished **by making false statements** and submitting false books to a Government employee (Government's Petition for Modification, P. 15, and discussion in Petition for Writ, pp. 39 to 42). We there demonstrated that the filing of the returns are not overt acts relevant to the objective of the conspiracy now relied on to attempt to evade by making false statements and submitting false records. Irrelevant acts cannot be overt acts committed pursuant to and in furtherance of a conspiracy to accomplish the specific objective alleged in the indictment **(Yates v. U. S.,**

352 U.S. 298). Allegation of such acts is "surplusage" **(Bridges v. U. S., 346 U.S. 209)** and is "innocuous and may be ignored" **(Ford v. U. S., 273 U.S. 593).** Allegation of surplusage and innocuous allegations cannot support the jurisdiction of the Court.

The Government's Brief does not comment on this contention.

IV.

Under the statement of "Statutes Involved," the Government quotes the provisions of **18 U.S.C.A. 1001,** which defines the offense of making false statements to a Government Agency. This statute is not involved in this case.

In paragraph B of the indictment (Tr. 5), it charged conspiracy to violate that statute, but that charge was withdrawn by the Court from consideration of the Jury (Tr. 1806). The Court instructed:

> "The offense stated in A and B as alleged objectives of the conspiracy are wholly withdrawn from your consideration as objectives of the conspiracy charged. Accordingly, now you may only consider one question, did William R. Forman conspire with Armador A. Seijas to avoid the taxes of Armador A. Seijas, Betty Seijas and other, and so violate Section 145(b) of the Internal Revenue Code?"

V.

The Government seeks to reinstate the intolerable conditions that were clearly and definitely condemned by this Court in the **Lutwak, Krulewitch and Grunewald cases.**

The purported "alternative theory" seeks to reintroduce into the law, applicable to the statute of limitations in conspiracy cases, the rejected "implied" conspiracy thereof condemned in those cases. It was definitely established in those cases that the implied conspiracy theory would, in effect, wipe out the statute of limitations in conspiracy cases. The cases stand for the proposition that the statute of limitations cannot be extended in the absence of

> "an express original agreement among the conspirators to continue to act in concert in order to cover up for their own self protection traces of the crime after its commission."

This Court held in those cases that this express original agreement cannot be established by allegation and proof of overt acts. There must be evidence of the conspiracy as distinguished from overt acts in furtherance of a conspiracy.

"An overt act is something apart from the conspiracy."

Marino v. U. S., 91 F.2d 691 (9th Cir.).

Evidence of the commission of overt acts do not establish comspiracy.

Weniger v. U. S., 47 F.2d 692 (9th Cir).

In the **Krulewitch case,** this Court said that

"The very same acts of concealment"

cannot

> "be used as circumstantial evidence from which can be inferred that there was **from the beginning an 'actual' agreement to conceal . . . .** conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment." (Emphasis added)

In **Fiswick v. U. S., 329 U.S. 211,** this Court held that the overt acts in furtherance of the primary conspiracy cannot be made to serve the "double duty"

(a) to establish a subsidiary conspiracy; and

(b) commission of acts in furtherance thereof.

In the case at bar, the purported "alternative theory" is predicated on the allegation that defendants conspired to attempt to evade the tax by making false statements and submitting false books for the purpose of concealing the tax liability and upon evidence which the Government claims supports this allegation. But this is the very heart of the "primary" conspiracy. It is not like the allegation of the "subsidiary" conspiracy in the **Grunewald case** which expressly alleged:

> "It was part of the conspiracy that the defendants and co-conspirators would make **continuing efforts to avoid detection and prosecution** by an governmental body . . . of tax frauds perpetrated by the defendants
>
> . . . . . .

> 'It was further a part of the conspiracy that the defendants and co-conspirators at all times would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the acts done pursuant to and the purposes of said conspiracy.' " (Emphasis added)

This was the distinct allegation of the subsidiary conspiracy which would prolong the statute of limitations. It was the agreement **to act in concert to prevent detection and prosecution** that is the subject matter of the subsidiary conspiracy and not the same acts of concealment which are inherent in all conspiracy cases.

In the case at bar, the Government again attempts to do what was condemned in those cases, namely, to imply the subsidiary conspiracy **from the same circumstances and overt acts by which it supports its claim of primary conspiracy.** The acts alleged, in the case at bar, do not warrant the submission of the case to another Jury upon the purported "alternative theory." The acts alleged do not, as a matter of law, operate to extend the statute of limitations.

The fact that the Government is seeking in the case at bar to resort to the theory rejected in the **Krulewitch and Grunewald cases** is demonstrated by the following observations of this Court in the **Grunewald case:**

> "Says the Government, 'from the very nature of the conspiracy . . . . there had to be, and was, from the outset a conscious, deliberate, agreement to conceal . . . . each and every

aspect of the conspiracy . . . . It is then argued that since the alleged conspiracy to conceal clearly continued long after the main criminal purpose of the conspiracy was accomplished, and since overt acts in furtherance of the agreement to conceal was performed well within the indictment period, the prosecution was timely.'

. . . . . .

'Sanctioning the Government's theory would for all practical purpose wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind conspirators."

. . . . . .

'True, in both Krulewitch and Lutwak there is language in the opinions stressing the fact that only an implied agreement to conceal was relied on. Yet when we look to the facts of the present cases, we see that the evidence from which the Government here asks us to deduce an 'actual' agreement to conceal reveals nothing beyond that adduced in prior cases.

. . . . . .

We find in all this nothing more than what was involved in Krulewitch, that is, (1) a criminal conspiracy which is carried out in secrecy; (2) a continuation of the secrecy after the accomplishment of the crime; and (3) desperate attempts to cover up after the crime begins to come to light; and so we cannot agree that this case does not fall within the ban of those prior opinions. . . .

. . . . . .

Today the Government merely rearranges the argument. It states that the very same acts of concealment should be used as circumstantial evidence from which it can be inferred that there was from the beginning an 'actual' agreement to conceal.' "

This was clearly a determination that an agreement from the beginning to conceal the conspiracy and to avoid detection and prosecution cannot be inferred from the mere fact that the defendants conspired to commit an offense and committed acts of concealment of the offense.

In the case at bar, the Government's "alternative theory" is the same as the theory rejected in the **Grunewald case.**

To permit the Opinions of October 27, 1958, and February 26, 1959, to stand, would operate to dissipate the definite rules of law applicable to the statute of limitations in conspiracy cases as established in the **Krulewitch and Grunewald cases.**

The Original Opinion of September 15, 1958, correctly determined the issues as they were presented and made a proper and lawful disposition of the case when it directed the entry of a judgment of acquittal.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD
Of Counsel
Public Service Building,
Portland, Oregon.